

**REMARKS**

Claims 1-3, 6, 28, 40, 47, 72, 75, 80, 96-98, 101, 123, 135, 142, 167, 170, 175, and 191-206 are now pending in this application. With this amendment Applicants have added new claims 191-206 and amended claims 1, 47, 72, 75, 80, 96, 142, 167, 170, and 175. Applicants have also provided an amendment to the specification. In reply to the Office Action dated September 22, 2004 ("Office Action"), Applicants present the following remarks and arguments to progress this application towards allowance.

**I. Specification Amendments**

The specification has been amended to update the status information regarding related U.S. applications. This information was originally added to the specification in the Transmittal Letter filed with this application on November 4, 2003. The amendment updates the specification to reflect that U.S. Application Serial No. 09/971,028 has now issued as U.S. Patent No. 6,716,420. As such, this amendment merely conforms the specification to the rules regarding presentation of related applications and adds no prohibited new matter. Applicants respectfully request that this amendment be entered without objection.

**II. Claim Amendments**

Claim 1 has been amended to recite a method for dispersing at least one coloring agent in a composition chosen from one or more of a mascara, an eyeliner, a foundation, a lipstick, a blusher, a make-up removing product, a make-up product for the body, an eyeshadow, a face powder, a concealer, a shampoo, a conditioner, an

anti-sun product, a care product for skin, a care product for lips, and a care product for hair. Claim 1 has also been amended to expressly recite at least one coloring agent, which was inherent in original claim 1 as it was directed to a “method for dispersing at least one coloring agent.” Finally, claim 1 has been amended to recite that the “at least one heteropolymer is included in said composition in an amount effective to disperse said at least one coloring agent.” Support for each of these amendments is found in the original specification in at least paragraph [0095]. Other amendments to claim 1 merely correct the form of the claim as necessitated by the above-mentioned amendments.

Claims 47, 72, 75, and 80 have been amended merely to reconcile their language to claim 1, from which they depend, and to recite consistent language across each dependent claim. As such, these amendments are directed to the form of the claims and are not intended to impact the scope of the claimed subject matter.

Claim 96 has been amended to recite a method of providing at least one property chosen from gloss and intense color to a composition chosen from one or more of a mascara, an eyeliner, a foundation, a lipstick, a blusher, a make-up removing product, a make-up product for the body, an eyeshadow, a face powder, a concealer, a shampoo, a conditioner, an anti-sun product, a care product for skin, a care product for lips, and a care product for hair. Claim 96 has also been amended to recite that the “at least one heteropolymer is included in said composition in an amount effective to disperse said at least one coloring agent.” Support for these amendments is found in the original specification in at least paragraph [0095]. Other amendments to claim 96 merely correct the form of the claim as necessitated by the above-mentioned amendments.

Claims 142, 167, 170, and 175 have been amended merely to reconcile their language to claim 96, from which they depend, and to recite consistent language across each dependent claim. As such, these amendments are directed to the form of the claims and are not intended to impact the scope of the claimed subject matter.

As shown above, each of the claim amendments presented in this paper is fully supported by the original specification and, thus, does not result in the addition of any prohibited new matter. Applicants respectfully request that these amendments be entered and considered by the Office without objection.

### III. New Claims

#### A. Claims 195-199

New claim 195 recites a method for dispersing at least one coloring agent in a cosmetic composition comprising including in said cosmetic composition (i) at least one coloring agent, and (ii) at least one heteropolymer chosen from polyamide polymers of formula (I), wherein the at least one heteropolymer is included in said cosmetic composition in an amount effective to disperse said at least one coloring agent. New claims 196-199 are dependent from claim 195 and recite the cosmetic composition further comprising at least one liquid fatty phase, at least one polysaccharide resin, at least one film former, and at least one fatty alcohol, respectively. Support for each of these new claims 195-199 is found in the specification in at least original claims 1, 28, 47, 72, 75, and 80, as well as original paragraph [0095]. Because the original specification explicitly provides support for claims 195-199, no prohibited new matter has been added and Applicants request these claims be entered without objection.

B. Claim 203

New claim 203 recites a method of providing at least one property chosen from gloss and intense color to a cosmetic composition, comprising including in said cosmetic composition (i) at least one heteropolymer chosen from polyamide polymers of formula (I), and (ii) at least one coloring agent, wherein the at least one heteropolymer is included in said cosmetic composition in an amount effective to provide said at least one property chosen from gloss and intense color. Support for new claim 203 is found in the original specification in at least claims 96 and 123, as well as paragraph [0095]. Because the original specification explicitly provides support for claim 203, no prohibited new matter has been added and Applicants request these claims be entered without objection.

C. Claims 202 and 206

New claims 202 and 206 are dependent from claims 195 and 203, respectively, and recite that the cosmetic composition is a nail composition. Support for these new claims is found in the original specification in at least paragraph [0095]. Because the original specification explicitly provides support for claims 202 and 206, no prohibited new matter has been added and Applicants request they be entered without objection.

D. Claims 191-194, 200-201, and 204-205

Applicants have added new claims 193-194, 201, and 205, which recite an at least one heteropolymer chosen from ethylenediamine/stearyl dimer dilinoleate copolymer. Applicants have also added new claims 191-192, 200, and 204, which recite an at least one heteropolymer chosen from ethylenediamine/stearyl dimer tallate copolymer. The original specification fully supports these new claims in at least

paragraph [0061], which recites Uniclear® and that Uniclear® may be “mixtures of copolymers derived from monomers of (i) C<sub>36</sub> diacids and (ii) ethylenediamine.” In addition, the International Cosmetic Ingredient Dictionary and Handbook, 10th Ed. (2004) (“CTFA”), at pages 657-658 and 3583 (attached herewith as Exhibit A), states (1) that ethylenediamine/stearyl dimer tallate copolymer is at least one copolymer of ethylenediamine and tall oil dimer acid monomers, and (2) that ethylenediamine/stearyl dimer dilinoleate copolymer is at least one copolymer of ethylenediamine and dilinoleic acid monomers, both being end-blocked with stearyl alcohol and a trade name for both being Uniclear®. As the original specification reasonably conveys these recited copolymers, these claims do not result in the addition any prohibited new matter. Therefore, Applicants respectfully request that claims 191-194, 200-201, and 204-205 be entered without objection.

Applicants note that, in co-pending Application Serial Nos. 09/937,314, 10/012,051, and 10/203,018, the Office requested those Applicants provide some documentation showing that these species of polyamide polymer (i.e., those known by the trade name Uniclear®) were known at the time these co-pending applications were filed. Accordingly, in those cases the Office was provided with a redacted version of confidential proprietary documents from the Assignee company showing that ethylenediamine/stearyl dimer tallate and dilinoleate copolymers were known as Uniclear® prior to the filing date of the applications. *See Exhibit B (Redacted Proprietary Documents).* In the present case, the Office has previously indicated it would also require such documentation.

Applicants do not believe, however, that the requested confidential proprietary documents are either necessary or legally required. As discussed above, the specification describes the copolymers known as Uniclear® and necessarily establishes that these species of structuring agents were known at the time the application was filed. The supplied information from the CTFA, *see Exhibit A*, further demonstrates that Uniclear® is the trade name for ethylenediamine/stearyl dimer tallate copolymer and for ethylenediamine/stearyl dimer dilinoleate copolymer, which establishes that the claimed structuring agents were known at the time of filing. However, solely in an effort to advance prosecution of this case, Applicants attach a copy of the redacted confidential proprietary documents. Therefore, as claims 191-194, 200-201, and 204-205 are fully supported by the original specification, add no new matter, and have been shown to have been known at the time this application was filed, Applicants respectfully request that these claims be entered and examined without objection.

#### **IV. Rejections Under 35 U.S.C. § 112, First Paragraph**

The Office rejected claims 1-190 under 35 U.S.C. § 112, first paragraph, for failure to comply with the written description requirement, asserting that the specification does not contain support for the heterocyclic ring systems recited in the description of the R<sup>4</sup> group of formula (I). *See* Office Action at page 2. In addition, the Office alleges that the specification neither describes nor exemplifies any compound within the recited “organic groups comprising atoms chosen from carbon atoms, hydrogen atoms, oxygen atoms, and nitrogen atoms” of the R<sup>3</sup> group of formula (I). *Id* at pages 2-3. Applicants disagree and respectfully traverse these rejections.

A. The Office Has Misunderstood the Claims

As evidenced by the rejections under 35 U.S.C. § 112, first paragraph, and §§ 102(e) and 103(a), Applicants point out that the Office has misunderstood the claims. In each rejection, the Office indicates its belief that the polymers of formula (I) are required in independent claims 1 and 96. However, claims 1 and 96 recite a heteropolymer comprising a polymer skeleton which comprises at least one hydrocarbon-based repeating unit comprising at least one hetero atom. Only claims 28 and 123, which are dependent from claims 1 and 96, respectively, and new independent claims 195 and 203 specifically recite at least one heteropolymer chosen from polyamide polymers of formula (I). The Office's reading of a limitation from a dependent claim into independent claims 1 and 96 is based on a misunderstanding. See 35 U.S.C. § 112, third and fourth paragraphs; *see also Dana Corp. v. Am. Axle & Mfg., Inc.*, 279 F.3d 1372, 1376 (Fed. Cir. 2002) ("dependent claims necessarily add limitations to the claims from which they depend").

B. Test for Written Description

Possession is the cornerstone of the written description requirement: "the test for compliance with § 112 has always required sufficient information in the original disclosure to show that the inventor possessed the invention at the time of the original filing." *Moba, B.V. v. Diamond Automation, Inc.*, 66 U.S.P.Q.2d 1429, 1439 (Fed. Cir. 2003). An applicant can show possession by pointing out adequate or sufficient description for the claims in the original specification, as would be understood by one of ordinary skill in the art. See MPEP § 2163(I).

C. R<sup>4</sup> Group and “Heterocyclic Structure”

In regards to the Office’s rejection regarding the R<sup>4</sup> group of formula (I) in claims 28 and 123<sup>1</sup>, the specification clearly contains sufficient support for heterocyclic structures and ring systems in at least paragraphs [0046] to [0058]. Specifically, paragraph [0053] explains that the R<sup>4</sup> group of formula (I) is chosen from hydrogen atoms, C<sub>1</sub> to C<sub>10</sub> alkyl groups, and direct bonds to R<sup>3</sup> or to another R<sup>4</sup>. This paragraph further explains that when the R<sup>4</sup> group is a direct bond, heterocyclic ring systems are possible that are defined in part by R<sup>4</sup>-N-R<sup>3</sup>.

Moreover, paragraph [0046] specifically incorporates by reference U.S. Patent No. 5,783,657 (“the ‘657 patent”) for when the at least one heteropolymer is at least one polyamide polymer of formula (I). See 37 C.F.R. § 1.57(c); MPEP § 608.01(p) (both stating that information to fulfill the written description requirement may be properly incorporated by reference from a U.S. patent). The ‘657 patent, in at least column 6, line 9 to column 7, line 14, clearly describes to one of ordinary skill in the art the heterocyclic ring systems and structures possible with the R<sup>4</sup> groups of formula (I).

In light of the description in the aforementioned paragraph of this application, taken together with the disclosure of the ‘657 patent, the recitation of heterocyclic structures for the R<sup>4</sup> groups of formula (I) has adequate support in the specification to satisfy the written description requirement, i.e., one of ordinary skill in the art would

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<sup>1</sup> Applicants note that the Office has not rejected any specific claim having R<sup>4</sup> groups, but Applicants believe the Office intended for this rejection to apply to claims 28 and 123 which both recite the polyamide polymer of formula (I). If Applicants’ belief is incorrect, Applicants specifically request clarification on the record. Applicants also traverse the rejection to the extent it may be applied against new claims 195 and 203, which also recite formula (I).

readily understand Applicants to have possessed the heterocyclic structures and ring systems possible with the R<sup>4</sup> group at the time this application was filed.

In further support of this position, Applicants present the enclosed Declaration Under 37 C.F.R. § 1.132 of Stacy Sterphone ("Sterphone Declaration"). As shown by the Declaration, Ms. Sterphone has extensive experience with cosmetic formulations. See paragraphs 2-3. As can be seen from the Sterphone declaration, it is readily apparent to one of skill in the art that the R<sup>4</sup> groups recited in the claimed formula (I) would form heterocyclic structures. See paragraphs 7-7d. Ms. Sterphone explains in her Declaration that the present specification's description of the R<sup>4</sup> groups of formula (I), and the specific reference to the '657 patent, reveals the Applicants' possession of these heterocyclic structures. *See id.* The Declaration is, therefore, further evidence that one of ordinary skill in the art would understand the Applicants to have possessed the claimed heterocyclic structures possible with the R<sup>4</sup> groups of formula (I) from the descriptions provided in the original specification. Because the specification contains adequate written description for these heterocyclic structures, Applicants respectfully request this rejection be withdrawn.

D. R<sup>3</sup> Group and "Organic Groups"

In regards to the Office's rejection of the R<sup>3</sup> group of formula I in claims 28 and 123<sup>2</sup>, the specification clearly contains sufficient support for the organic groups possible

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<sup>2</sup> Applicants note that the Office has not rejected any specific claim having R<sup>3</sup> groups, but Applicants believe the Office intended for this rejection to apply to claims 28 and 123 which both recite the polyamide polymer of formula (I). If Applicants' belief is incorrect, Applicants specifically request clarification on the record. Applicants also traverse the rejection to the extent it may be applied against new claims 195 and 203, which also recite formula (I).

for the R<sup>3</sup> groups of formula (I) in at least paragraphs [0046] to [0058]. Paragraph [0052] explains that the R<sup>3</sup> group may be chosen from organic groups in part comprising at least two carbon atoms. Paragraph [0058] then gives concrete and specific examples of possible R<sup>3</sup> groups: C<sub>2</sub> to C<sub>36</sub> hydrocarbon-based groups, C<sub>2</sub> to C<sub>12</sub> hydrocarbon-based groups, and polyoxyalkylene groups. This paragraph also defines specific types of hydrocarbon-based groups and provides examples thereof. As above, the '657 patent, specifically incorporated by reference in paragraph [0046], further clearly describes the organic groups possible for the R<sup>3</sup> groups of formula (I) to one of ordinary skill in the art in at least column 6, line 9 to column 7, line 14, and specifically column 6, lines 9-65. In light of the above-noted description in the specification, taken together with the incorporation by reference of the '657 patent, the claimed recitation of R<sup>3</sup> groups of formula (I) has adequate support in the original specification to satisfy the written description requirement.

The enclosed Sterphone Declaration provides additional evidence of this support. As can be seen from the Sterphone Declaration, the organic groups possible with the R<sup>3</sup> groups recited in the claimed formula (I) are readily apparent to one of ordinary skill in the art. See paragraphs 8-8c. Ms. Sterphone explains in the Declaration that the present specification's description of the R<sup>3</sup> groups, by both its provided examples and its specific reference to the '657 patent, reveals the Applicants' possession of these organic groups. See *id.* Thus, the Sterphone Declaration is further evidence that one of ordinary skill in the art would understand the Applicants to have possessed the claimed organic groups possible with the R<sup>3</sup> groups of formula (I) from the descriptions provided in the original specification. Because the specification contains adequate written

description for these organic groups, Applicants respectfully request that this rejection be withdrawn.

#### V. Rejections under 35 U.S.C. § 112, Second Paragraph

The Office rejected claims 1-190 under 35 U.S.C. § 112, second paragraph, as indefinite for failing to particularly point out and distinctly claim the subject matter that Applicants regard as the invention. As discussed below, Applicants respectfully disagree and traverse these rejections.

##### A. “Comprising” Carbon Atoms in Claims 28 and 123

The Office rejected claims 1-190 stating that “the expression ‘comprising’ for the definition of carbon atoms lacks clarity, since the carbon atoms have fixed chain length.” Office Action at page 3. As only claims 28 and 123 recite this language, Applicants respectfully provide the following arguments concerning this rejection with respect to those claims<sup>3</sup>.

In determining whether the claims are sufficiently definite to comply with 35 U.S.C. § 112, second paragraph, the MPEP instructs that “[t]he essential inquiry pertaining to this requirement is whether the claims set out and circumscribe a particular subject matter with a reasonable degree of clarity and particularity.” MPÉP § 2173.02. Moreover, applicants are allowed “some latitude in the manner of expression and the aptness of terms” such that the Office’s inquiry is not to “whether more suitable language or modes of expression are available,” but whether the language is definite in

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<sup>3</sup> Applicants also traverse the rejection to the extent it may be applied against new claims 195 and 203, which also recite formula (I).

light of the content of the application, the teachings of the prior art, and the claim interpretation that may be given by one of ordinary skill in the art. *Id.* In the present case, the language in the rejected claims pertaining to groups or compounds that “comprise” recited numbers of carbon atoms clearly meets this threshold test for definiteness, as explained below.

The term “comprising” is open-ended and does not exclude additional elements. See MPEP § 2111.03. In regards to the R<sup>1</sup> groups recited in claims 28 and 123 (as well as new claims 195 and 203), those claims state that the R<sup>1</sup> group may be chosen from either alkyl or alkenyl groups “comprising at least 4 carbon atoms.” Paragraphs [0011] and [0012] of the original specification define alkyl and alkenyl groups, respectively, and both state that the groups may be either substituted or comprise heteroatoms intercalated into the chain.

As such, the “comprising” language is particularly definite and precise because it indicates that the R<sup>1</sup> group, while containing 4 or more carbon atoms, may also contain other types of atoms. The recitation of R<sup>3</sup> groups is similarly definite. For these groups, the claims themselves explicitly state that the R<sup>3</sup> group may contain different types of atoms (carbon, hydrogen, oxygen, and nitrogen) “with the proviso that R<sup>3</sup> comprises at least 2 carbon atoms.” And moreover, for both the R<sup>1</sup> and R<sup>3</sup> groups, the rejected claims recite only a minimum number of carbon atoms, thus making Applicants’ use of “comprising” a reasonable expression of the number of carbon atoms in these groups.

Applicants’ use of the term “comprising” or “comprises” in reference to carbon atoms does not lack clarity in violation of 35 U.S.C. § 112, second paragraph. As shown in the above discussion, the term is reasonable language for expressing the

claimed subject matter such that the claims are sufficiently definite for patenting. As such, Applicants respectfully request that the rejection be withdrawn.

B. "Metes and Bounds" of R<sup>3</sup> and R<sup>4</sup> in Claims 28 and 123

The Office rejected claims 1-190 stating that the definitions of R<sup>3</sup> and R<sup>4</sup> are "without metes and bounds." Office Action at pages 3-4. As only claims 28 and 123 recite this language, Applicants respectfully provide the following arguments concerning this rejection with respect to those claims<sup>4</sup>.

As discussed above at length with respect to rejections under both the first and second paragraphs of 35 U.S.C. § 112, the recitations of the R<sup>3</sup> and R<sup>4</sup> groups are stated with sufficient clarity and definiteness. In fact, the Sterphone Declaration specifically reveals this clarity, explaining how one of ordinary skill in the art would readily understand the scope of the claims. The Sterphone Declaration explicitly supports Applicants' position that the claimed recitations adequately define both the heterocyclic structures possible with the recited R<sup>4</sup> groups and the organic groups possible with the recited R<sup>3</sup> groups. See Sterphone Declaration at paragraphs 7d and 8c. As such, claims 1 and 37-38 sufficiently and reasonably recite the claimed R<sup>3</sup> and R<sup>4</sup> groups such that those elements are not "without metes and bounds." Therefore, Applicants respectfully request that this rejection be withdrawn.

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<sup>4</sup> Applicants also traverse the rejection to the extent it may be applied against new claims 195 and 203, which also recite formula (I).

## VI. Rejection Under 35 U.S.C. § 102(e)

The Office has rejected claims 1-68, 75-87, 89-163, 170-183, and 185-190 under 35 U.S.C. § 102(e) as anticipated by U.S. Patent No. 6,497,861 to Wang et al., with the prior art at the time of filing evidenced by U.S. Patent No. 5,783,657 to Pavlin. The Office asserts that Wang et al. teaches each element of the cited claims and therefore anticipates. Applicants submit that this rejection is rendered moot by the enclosed Declaration Under 37 C.F.R. § 1.131 of Mohamed Kanji, which shows that Wang et al. does not constitute prior art to this application.

The instant application claims priority under 35 U.S.C. § 120 to Application Serial No. 09/971,028, filed on October 5, 2001. Wang et al. issued on December 24, 2002, from an application filed on June 21, 2001. The Office notes and Applicants agree that Wang et al. could only be prior art under 35 U.S.C. § 102(e) because, although it issued as a U.S. patent after the filing date of this application, it was based on an application with an effective U.S. filing date before the filing date of this application.

A declaration under 37 C.F.R. § 1.131 is appropriate to establish a date of invention of the subject matter of the claims of a patent application prior to the effective date of a U.S. patent where the application and the patent do not claim the same patentable invention as defined in 37 C.F.R. § 41.203(a). See MPEP § 715; *see also* 37 C.F.R. § 1.131(a)(1). The effective date of a U.S. patent is the earlier of its publication date or the date that it is effective as a reference under 35 U.S.C. § 102(e). See 37 C.F.R. § 1.131(a). As such, the effective date of Wang et al. is June 21, 2001.

Applicants do not believe that the pending claims define the same patentable subject matter as any claim of Wang et al., at least because the claims of Wang et al.

require an alkylene-oxide containing emulsion stabilizer or surfactant, neither of which is specifically recited in Applicants' present claims. Therefore, a declaration under 37 C.F.R. § 1.131 can be appropriate to establish invention of the subject matter of the pending claims prior to June 21, 2001, the effective date of Wang et al.

Accordingly, Applicants submit herewith a Declaration Under 37 C.F.R. § 1.131 of Mohamed Kanji ("Kanji Declaration"), a named applicant of this application and a co-inventor of the subject matter described and presently claimed. The evidence presented in the Kanji Declaration shows that, prior to June 21, 2001, several mascara compositions were prepared and that these compositions were known to have been fundamentally useful as mascara compositions and exhibited at least one of the following characteristics: (1) good color dispersion; (2) gloss; and (3) intense color. See Kanji Declaration, paragraph 10. The Exhibits referred to in the Kanji Declaration, in conjunction with the inventor's testimony relating thereto, clearly establish reduction to practice of the presently claimed invention before the June 21, 2001, effective date of Wang et al.

Moreover, the Court of Customs and Patent Appeals has instructed that a reference disclosing elements not shown in a Rule 131 Declaration may nevertheless be antedated if those elements appear in dependent claims:

To hold that [a reference] is not removed by the showing here presented would lead to an anomalous result, i.e., if appellant broadened his claims by deleting [the narrowing element], so as to read literally on [the reference], [the reference] would not be available as a reference against such broadened claims because appellant's antedating affidavit would be satisfactory in every respect. It cannot be the law that the same affidavit is insufficient to remove the same reference applied against the slightly narrower claims presented here.

*In re Spiller*, 182 U.S.P.Q. 614, 620 (C.C.P.A. 1974) (quoting *In re Stryker*, 168 U.S.P.Q. 372, 373 (C.C.P.A. 1971)); see MPEP § 715.02. Therefore, with the submission of the Kanji Declaration, Applicants submit that Wang et al. has been removed as a prior art reference pursuant to 37 C.F.R. § 1.131 for each element of pending claims 1-3, 6, 28, 40, 47, 72, 75, 80, 96-98, 101, 123, 135, 142, 167, 170, 175, and 191-206. This antedating of Wang et al. renders moot the rejection under 35 U.S.C. § 102(e), and Applicants respectfully request that it be withdrawn.

## VII. Rejection under 35 U.S.C. § 103(a)

The Office has rejected claims 1-72, 75-167, and 170-190 under 35 U.S.C. § 103(a) over the combination of Wang et al., U.S. Patent No. 6,726,917 to Kanji et al., and U.S. Patent No. 6,036,947 to Barone et al. The Office believes that Wang et al. teaches every limitation of the pending claims except for the polysaccharide resin and nacreous pigments, for which the Office relies on Kanji et al. and Barone et al. See Office Action at pages 5-6. Applicants respectfully traverse this rejection.

### A. Standard for *Prima Facie* Case of Obviousness

To establish a *prima facie* case of obviousness, the Office must show that the cited reference provides to one of ordinary skill in the art some suggestion or motivation to combine or modify its teachings in an effort to achieve all of the limitations of the claimed invention, with a reasonable expectation of success. See MPEP § 2143. Applicants believe that none of the remaining cited references, either separately or in

any combination, satisfies this test for a *prima facie* case of obviousness and, therefore, respectfully traverse these rejections.

**B. Wang et al. Is Not Prior Art**

As discussed in section VI of this paper in regards to the §102(e) rejection, Wang et al. is not prior art to this application, as shown by the submitted Declaration Under 37 C.F.R. § 1.131 of Mohamed Kanji. Therefore, Wang et al. cannot form part of a valid obviousness rejection under 35 U.S.C. § 103(a).

**C. Kanji et al. Is Disqualified As Prior Art Under 35 U.S.C. § 103(c)**

The instant application claims priority under 35 U.S.C. § 120 to Application Serial No. 09/971,028, filed on October 5, 2001. Kanji et al. issued on April 27, 2004, from an application filed on December 18, 2000. Therefore, Applicants note that Kanji et al. can only be prior art under 35 U.S.C. § 102(e) because, although it issued as a U.S. patent after the filing date of this application, it was based on an application with an effective U.S. filing date before the filing date of this application.

According to 35 U.S.C. § 103(c),

[s]ubject matter developed by another person, which qualifies as prior art only under one or more subsections (e), (f), and (g) of section 102 of this title, shall not preclude patentability under this section where the subject matter and the claimed invention were, at the time the invention was made, owned by the same person or subject to an obligation of assignment to the same person.

This statute operates to remove Kanji et al. as prior art against this application.

While both this application and Kanji et al. name Mohamed Kanji as an inventor, Kanji et al. also names Ewelina Pitusiak as an inventor. Therefore, because this application and the cited patent name different inventive entities, even though one inventor overlaps,

Kanji et al. qualifies as “subject matter developed by another person” under 35 U.S.C. § 103(c). *See Ex Parte Utschig*, 156 U.S.P.Q. 156, 157 (B.P.A.I. 1966) (“[i]t is well settled that a joint application or patent and a sole application or patent by one of the joint inventors are [by] different legal entities”). In addition, both Kanji et al. and this application were subject to an obligation of assignment to L’Oréal S.A. at the time this invention was made, as evidenced by the assignment information recorded for Kanji et al. on April 23, 2001, at Reel 011703, Frame 0164, and the assignment information recorded for this application on December 28, 2001, at Reel 012411, Frame 0820.

Applicants also point out that § 103(c) only applies to subject matter constituting prior art under § 103, and not subject matter under § 102. *See MPEP § 2146*. Here, the Office readily admits that Kanji et al. is applied only under § 103. *See Office Action* at pages 5-6. Therefore, by operation of 35 U.S.C. § 103(c), Kanji et al. is not available as prior art to this application.

D. Barone et al. Does Not Render Obvious the Pending Claims

The Office asserts only that Barone et al. teaches cosmetic compositions using a wax, a film former, a fatty phase, and pigments as well as nacreous pigments. *See Office Action* at page 5. In Section VII(A), Applicants noted the requirements for a *prima facie* case of obviousness. In the absence of Wang et al. and Kanji et al., Barone by itself does not meet these requirements to support a *prima facie* case of obviousness. Therefore, Applicants respectfully request that the rejection under 35 U.S.C. § 103(a) be withdrawn and that the pending claims be allowed.

### **VIII. Commonly Assigned Co-Pending Applications and Patents**

For the Office's convenience, Applicants identify in Table A below several co-pending applications and patents, including the instant application. This information should assist the Office in assessing any possible issues of statutory or obviousness-type double patenting. For the Office's convenience, Applicants have provided herewith in Exhibit C the pending claims of all the co-pending applications and patents listed in Table A.

In addition, Applicants do not believe that any issue exists under 35 U.S.C. § 102(e) and/or 35 U.S.C. § 103 with respect to any of the identified co-pending applications or patents listed in Table A, or any relevant publications thereof or relevant PCT publications of a counterpart thereof. Moreover, all of the applications listed in Table A that were filed prior to the priority date of the instant application were commonly owned by the Assignee of this application at the time the currently claimed invention was made. The available assignment information listed for each co-pending application or patent in Table A demonstrates that none of these prior-filed applications, patents, or publications are available as prior art under 35 U.S.C. § 102(e) / § 103 against any of the pending claims by operation of 35 U.S.C. § 103(c).



**Table A — Co-Pending Applications and Patents**

Attorney Docket No.	U.S. Patent Application No.	U.S. Filing Date or § 371(c) Date	Inventor(s)	Title	Assignment Recorded (Reel, Frame, Date)	Publication Date
05725.0594-00000	09/733,899	December 12, 2000	Mohamed KANJI, Carl ORR, and Carlos O. PINZON	COSMETIC COMPOSITIONS CONTAINING AT LEAST ONE HETERO POLYMER AND AT LEAST ONE FILM-FORMING SILICONE RESIN AND METHODS OF USING	Reel 011723, Frame 0503, on April 20, 2001	U.S. Published Application No. US 2002/0114773 A1, on August 22, 2002
05725.0595-00000	09/733,900	December 12, 2000	Carlos O. PINZON and Paul THAU	COSMETIC COMPOSITIONS CONTAINING HETEROPOLYMERS AND OIL-SOLUBLE CATIONIC SURFACTANTS AND METHODS OF USING SAME	Reel 011639, Frame 0897, on March 23, 2001	U.S. Published Application No. US 2002/0122781 A1, on September 5, 2002 (Republished No. US 2003/0082126 A9 on May 1, 2003)
05725.0656-00000	09/618,066	July 17, 2000	Véronique FERRARI and Pascal SIMON	COMPOSITIONS IN RIGID FORM STRUCTURED WITH A POLYMER	Reel 011057, Frame 0676, on September 11, 2000	N/A: Will not publish
05725.0656-01000	09/685,577	October 11, 2000	Véronique FERRARI and Pascal SIMON	COMPOSITIONS IN RIGID FORM STRUCTURED WITH A POLYMER	Reel 011455, Frame 0203, on January 22, 2001	N/A: Will not publish

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Attorney Docket No.	U.S. Patent Application No.	U.S. Filing Date or § 371(c) Date	Inventor(s)	Title	Assignment Recorded (Reel, Frame, Date)	Publication Date
05725.0659-00000	09/618,032, issued on June 11, 2002, as U.S. Patent No. 6,402,408	July 17, 2000	Véronique FERRARI	COMPOSITION CONTAINING A LIQUID FATTY PHASE GELLED WITH A POLYAMIDE CONTAINING ESTER END GROUPS	Reel 011057, Frame 0007, on September 12, 2000	U.S. Patent No. 6,402,408, issued June 11, 2002
05725.0659-01000	09/685,578	October 11, 2000	Véronique FERRARI	COMPOSITION CONTAINING A LIQUID FATTY PHASE GELLED WITH A POLYAMIDE CONTAINING ESTER END GROUPS	Reel 011549, Frame 0914, on February 20, 2001	N/A: Will not publish
05725.0795-01000	10/182,830	August 2, 2002 § 371(c) Date: January 21, 2003	Roberto CAVA-ZZUTI, Véronique FERRARI, Brian MATTOX, Carlos O. PINZON, and Paul THAU	USE OF POLYAMIDE POLYMER IN A MASCARA COMPOSITION COMPRISING AT LEAST ONE SOLID SUBSTANCE HAVING A MELTING POINT OF 45°C OR GREATER	Reel 014040, Frame 0345, on May 7, 2003	U.S. Published Application No. US 2003/0147837 A1, on August 7, 2003
05725.0795-02000	10/787,441	February 27, 2004	Roberto CAVA-ZZUTI, Véronique FERRARI, Brian MATTOX, Carlos O. PINZON, and Paul THAU	METHOD OF MAKING A MASCARA COMPOSITION- COMPRISING POLYAMIDE POLYMER AND AT LEAST ONE SOLID SUBSTANCE HAVING A MELTING POINT OF 45°C OR GREATER	Reel 014040, Frame 0345, on May 7, 2003	U.S. Published Application No. US 2004/0166133 A1, on August 29, 2002

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Attorney Docket No.	U.S. Patent Application No.	U.S. Filing Date or § 371(c) Date	Inventor(s)	Title	Assignment Recorded (Reel, Frame, Date)	Publication Date
05725.0806-00000	09/733,896	December 12, 2000	Carlos O. PINZON and Paul THAU	COMPOSITIONS CONTAINING HETEROPOLYMERS AND OIL-SOLUBLE POLYMERS AND METHODS OF USING SAME	Reel 011765, Frame 0183, on April 26, 2001	U.S. Published Application No. US 2002/0120036 A1, on August 29, 2002 (Republished US 2003/0125427 A9 on July 3, 2003)
05725.0808-00000	09/733,898	December 12, 2000	Carlos O. PINZON, Paul THAU, and Isabelle BARA	COMPOSITIONS CONTAINING HETEROPOLYMERS AND OIL-SOLUBLE ESTERS AND METHODS OF USING SAME	Reel 011654, Frame 0869, on April 2, 2001	U.S. Published Application No. US 2002/0107314 A1, on August 8, 2002
05725.0808-02000	10/918,579	August 16, 2004	Carlos O. PINZON, Paul THAU, and Isabelle BARA	COMPOSITIONS CONTAINING HETEROPOLYMERS AND OIL-SOLUBLE ESTERS AND METHODS OF USING SAME	Reel 011654, Frame 0869, on April 2, 2001	U.S. Published Application No. US 2005-0019358 A1, on January 27, 2005
05725.0809-00000	09/733,897	December 12, 2000	Carlos O. PINZON and Paul THAU	COMPOSITIONS CONTAINING HETEROPOLYMERS AND METHODS OF USING SAME	Reel 011646, Frame 0966, on April 4, 2001	U.S. Published Application No. US 2002/0111330 A1, on August 15, 2002

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Attorney Docket No.	U.S. Patent Application No.	U.S. Filing Date or § 371(c) Date	Inventor(s)	Title	Assignment Recorded (Reel, Frame, Date)	Publication Date
05725.0816-01000	10/203,018	August 5, 2002  § 371(c) Date: March 24, 2003	Véronique FERRARI, Richard KOLOD-ZIEJ, Carlos O. PINZON, and Paul THAU	USE OF POLYAMIDE POLYMER IN A MASCARA COMPOSITION COMPRISING AT LEAST ONE INERT FILLER	Reel 014055, Frame 0428, on March 24, 2003	U.S. Published Application No. US 2003/0161848 A1, on August 28, 2003
05725.0816-02000	10/787,440	February 27, 2004	Véronique FERRARI, Richard KOLOD-ZIEJ, Carlos O. PINZON, and Paul THAU	METHOD OF MAKING A MASCARA COMPOSITION COMPRISING A POLYAMIDE POLYMER AND AT LEAST ONE INERT FILLER	Reel 014055, Frame 0428, on March 24, 2003	U.S. Published Application No. US 2004/0166076 A1, on August 26, 2004
05725.0817-01000	10/203,254	August 7, 2002  § 371(c) Date: December 20, 2002	Véronique FERRARI, Carlos O. PINZON, and Paul THAU	COSMETIC COMPOSITIONS CONTAINING AT LEAST ONE HETEROPOLYMER AND AT LEAST ONE GELLING AGENT AND METHODS OF USING THE SAME	Reel 013607, Frame 0258, on December 20, 2002	U.S. Published Application No. US 2003/0185780 A1, on October 2, 2003
05725.0819-01000	10/129,377	May 3, 2002  § 371(c) Date: October 16, 2002	Véronique FERRARI	COMPOSITION STRUCTURED WITH A POLYMER CONTAINING A HETEROATOM AND AN ORGANOGELLATOR	Reel 014643, Frame 0199, on October 16, 2003	U.S. Published Application No. US 2004/0223987 A1, on November 11, 2004

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<b>Attorney Docket No.</b>	<b>U.S. Patent Application No.</b>	<b>U.S. Filing Date or § 371(c) Date</b>	<b>Inventor(s)</b>	<b>Title</b>	<b>Assignment Recorded (Reel, Frame, Date)</b>	<b>Publication Date</b>
05725.0832-00000	09/749,036	December 28, 2000	Véronique FERRARI and Véronique JACQUES	COMPOSITION COMPRISING AT LEAST ONE HETERO POLYMER AND AT LEAST ONE PASTY FATTY SUBSTANCE AND METHODS FOR USE	Reel 011723, Frame 0518, on April 20, 2001	U.S. Published Application No. US 2001/0031280 A1, on October 18, 2001
05725.0895-00000	09/971,028 issued on April 6, 2004, as U.S. Patent No. 6,716,420	October 5, 2001	Mohamed KANJI	METHODS OF USE AND OF MAKING A MASCARA COMPRISING AT LEAST ONE COLORING AGENT AND AT LEAST ONE HETEROPOLYMER	Reel 012411, Frame 0820, on December 28, 2001	U.S. Published Application No. US 2003/0086883 A1, on May 8, 2003
05725.0895-01000	10/413,217	April 15, 2003	Mohamed KANJI	METHODS OF USE AND OF MAKING A MASCARA COMPRISING AT LEAST ONE COLORING AGENT AND AT LEAST ONE POLYAMIDE POLYMER CHOSEN FROM ETHYLENEDIAMINE/STEARYL DIMER TALLATE COPOLYMER	Reel 012411, Frame 0820, on December 28, 2001	U.S. Published Application No. US 2003/0198613 A1, on October 23, 2003
05725.0895-02000	10/699,780	November 4, 2003	Sue FENG and Mohamed KANJI	METHODS OF DISPERSING AT LEAST ONE COLORING AGENT USING AT LEAST ONE HETEROPOLYMER	Reel 012411, Frame 0820, on December 28, 2001	U.S. Published Application No. US 2004-0091510 A1, on May 13, 2004

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05725.0896-00000	10/198,931	July 22, 2002	Mohamed KANJI	COMPOSITIONS COMPRISING AT LEAST ONE HETEROPOLYMER AND FIBERS, AND METHODS OF USING THE SAME	Reel 013410, Frame 0044, on October 21, 2002	U.S. Published Application No. US 2004/0013625 A1, on January 22, 2004
05725.0920-00000	09/899,909, issued on August 13, 2002 as U.S. Patent No. 6,432,391	July 9, 2001	Isabelle BARA	TRANSPARENT SCENTED SOLID COSMETIC COMPOSITION	Reel 012278, Frame 0077, on October 23, 2001	U.S. Patent No. 6,432,391, issued August 13, 2002
05725.0932-00000	09/937,314	September 24, 2001 § 371(c) Date: December 6, 2001	Véronique FERRARI	A TRANSFER-FREE MASCARA COMPOSITION COMPRISING AT LEAST ONE VOLATILE SOLVENT AND AT LEAST ONE POLYMER	Reel 012476, Frame 0507, on January 17, 2002	U.S. Published Application No. US 2004/0086478 A1, on May 6, 2004
05725.0932-01000	10/933,431	November 22, 2004	Véronique FERRARI	A TRANSFER-FREE COMPOSITION STRUCTURED IN RIGID FORM BY A POLYMER	Reel 012476, Frame 0507, on January 17, 2002	Not yet published
05725.1003-00000	10/012,029, issued on December 28, 2004, as U.S. Patent No. 6,835,399	December 11, 2001	Nathalie COLLIN	COSMETIC COMPOSITION COMPRISING A POLYMER BLEND	Reel 013142, Frame 0645, on August 1, 2002	U.S. Published Application No. US 2003/0012764 A1, on January 16, 2003

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<b>Attorney Docket No.</b>	<b>U.S. Patent Application No.</b>	<b>U.S. Filing Date or § 371(c) Date</b>	<b>Inventor(s)</b>	<b>Title</b>	<b>Assignment Recorded (Reel, Frame, Date)</b>	<b>Publication Date</b>
05725.1003-01000	10/993,430	November 22, 2004	Nathalie COLLIN	COSMETIC COMPOSITION COMPRISING A POLYMER BLEND	Reel 013142, Frame 0645, on August 1, 2002	Not yet published
05725.1004-00000	10/012,051	December 11, 2001	Nathalie COLLIN	USE OF AT LEAST ONE POLYAMIDE POLYMER IN A MASCARA FOR RAPIDLY INCREASING THE AMOUNT OF MAKE-UP DEPOSITED ON EYELASHES	Reel 012847, Frame 0285, on April 30, 2002	U.S. Published Application No. US 2002/0189030 A1, on December 19, 2002
05725.1004-01000	10/990,475	November 18, 2004	Nathalie COLLIN	USE OF A POLYMER FOR OBTAINING AN EXPRESS MAKE-UP OF KERATIN MATERIALS	Reel 012847, Frame 0285, on April 30, 2002	Not yet published
05725.1005-00000	10/012,052	December 11, 2001	Nathalie COLLIN	COSMETIC COMPOSITION CONTAINING A WAX AND A POLYMER	Reel 012847, Frame 0264, on April 30, 2002	U.S. Published Application No. US 2002/0168335 A1, on November 14, 2002
05725.1018-00000	10/046,568	January 16, 2002	Xavier BLIN, Véronique FERRARI, and Frédéric AUGUSTE	NAIL POLISH COMPOSITION COMPRISING A POLYMER	Reel 013109, Frame 0731, on July 18, 2002	U.S. Published Application No. US 2002/0192168 A1, on December 19, 2002
05725.1020-00000	10/047,987	January 17, 2002	Véronique FERRARI	COSMETIC COMPOSITION COMPRISING A POLYMER AND A FLUORO OIL	Reel 012910, Frame 0028, on May 17, 2002	U.S. Published Application No. US 2002/0172696 A1, on November 21, 2002

<b>Attorney Docket No.</b>	<b>U.S. Patent Application No.</b>	<b>U.S. Filing Date or § 371(c) Date</b>	<b>Inventor(s)</b>	<b>Title</b>	<b>Assignment Recorded (Reel, Frame, Date)</b>	<b>Publication Date</b>
05725.1187-00000	10/312,083	December 23, 2002  § 371(c) Date: March 26, 2003	Patricia LEMANN	COSMETIC COMPOSITION COMPRISING AN EMULSION CONTAINING A LIQUID FATTY PHASE STRUCTURED WITH A POLYMER, AND AN ALKYLENE-OXIDE-CONTAINING EMULSION STABILIZER	Reel 014039, Frame 0976, on March 26, 2003	U.S. Published Application No. US 2003/0161807 A1, on August 28, 2003
05725.1198-00000	10/450,108	June 11, 2003  § 371(c) Date: June 11, 2003	Nathalie COLLIN	COSMETIC COMPOSITION COMPRISING A POLYMER AND FIBERS	Not yet filed/recorded	U.S. Published Application No. US 2004/0028636 A1, on February 12, 2004
05725.1228-00000	10/466,166	July 14, 2003  § 371(c) Date: January 20, 2004	Nathalie COLLIN	COSMETIC COMPOSITION COMPRISING A MIXTURE OF POLYMERS	Reel 015007, Frame 0018, on January 20, 2004	U.S. Published Application No. 2004/0126401 A1, on July 1, 2004
05725.1336-00000	10/459,636	June 12, 2003	Shao Xiang LU and Mohamed KANJI	COSMETIC EMULSIONS CONTAINING AT LEAST ONE HETERO POLYMER AND A SUNSCREEN AND METHODS OF USING SAME	Reel 014562, Frame 0576, dated October 3, 2003	U.S. Published Application No. 2004/0042987 A1, on March 4, 2004

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Attorney Docket No.	U.S. Patent Application No.	U.S. Filing Date or § 371(c) Date	Inventor(s)	Title	Assignment Recorded (Reel, Frame, Date)	Publication Date
05725.1337-00000	10/618,315 ABANDONED	July 11, 2003	Shao Xiang LU, Terry VAN LIEW, and Nathalie GEFFROY-HYLAND	COSMETIC COMPOSITIONS COMPRISING A STRUCTURING AGENT, SILICONE POWDER AND SWELLING AGENT	Reel 014385, Frame 0277, dated August 14, 2003  Subsequent assignment filed January 20, 2004	U.S. Published Application No. US 2005-0008598 A1, on January 13, 2005
05725.1338-01000	10/746,612	December 22, 2003	Shao Xiang LU, Terry VAN LIEW, Nathalie GEFFROY-HYLAND, and Mohamed KANJI	COSMETIC COMPOSITIONS COMPRISING A STRUCTURING AGENT, SILICONE POWDER AND SWELLING AGENT	Reel 014385, Frame 0277, dated August 14, 2003  Subsequent assignment filed January 20, 2004	U.S. Published Application No. US 2005-0008599 A1, on January 13, 2005
05725.1338-02000	10/747,412	December 22, 2003	Shao Xiang LU and Mohamed KANJI	COSMETIC EMULSIONS CONTAINING AT LEAST ONE HETERO POLYMER AND AT LEAST ONE SUNSCREEN AND METHODS FOR USING THE SAME	Not yet filed/recorded	U.S. Published Application No. US 2004/0247549 A1, on December 9, 2004
05725.1378-00000	11/019,382	December 23, 2004	Wei YU and Véronique FERRARI	COSMETIC COMPOSITION COMPRISING TWO DIFFERENT HETERO POLYMERS AND METHOD OF USING SAME	Not yet filed/recorded	Not yet published

Attorney Docket No.	U.S. Patent Application No.	U.S. Filing Date or § 371(c) Date	Inventor(s)	Title	Assignment Recorded (Reel, Frame, Date)	Publication Date
06028.0018-00000	10/203,375	August 9, 2002  § 371(c) Date: August 9, 2002	Nathalie JAGER-LEZER and Jean-Christophe SIMON	COLOURED TRANSPARENT OR TRANSLUCENT COSMETIC COMPOSITION	Reel 013318, Frame 0962, on August 9, 2002	U.S. Published Application No. US 2003/0026772 A1, on February 6, 2003
06028.0019-00000	10/203,374	August 9, 2002  § 371(c) Date: August 9, 2002	Jean-Christophe SIMON and Nathalie JAGER-LEZER	METHOD FOR MAKING A COLOURED MAKE-UP COSMETIC COMPOSITION WITH CONTROLLED TRANSMITTANCE	Reel 013321, Frame 0001, on August 9, 2002	U.S. Published Application No. US 2003/0044367 A1, on March 6, 2003

## IX. Information Disclosure Statements

Concurrently with the filing of this application, on November 4, 2003, Applicants filed with the Office an Information Disclosure Statement (IDS) listing references on a twenty-two (22) page Form PTO-1449. According to PAIR, this IDS is available on the Image File Wrapper System. Pursuant to 37 C.F.R. § 1.98(d), copies of the listed references were not provided as they were submitted in a prior application, Application Serial No. 09/971,028, upon which Applicants rely for the benefits provided in 35 U.S.C. § 120. The Office Action, however, did not indicate that these references had been considered and did not provide an initialed copy of the Form PTO-1449. Applicants respectfully request that the Office consider each reference cited in that IDS and kindly provide an initialed copy of the Form PTO-1449 indicating its consideration. Applicants

believe that each reference has been properly submitted; therefore, if the Office believes that any references are improperly cited and strikes-through the reference on the Form PTO-1449, Applicants kindly request that the Office provide a citation to a regulation showing that the citation or submission was improper.

Applicants have also filed a Supplemental Information Disclosure Statement concurrently with this Reply. Once again, Applicants respectfully request that the Office consider each reference cited in this Supplemental IDS and kindly provide an initialed copy of the Form PTO/SB/08 indicating that consideration. Applicants believe that each reference has been properly submitted; therefore, if the Office believes that any references are improperly cited and strikes-through the reference on the provided Form, Applicants request that the Office provide a citation to a regulation showing that the citation or submission was improper.

Finally, Applicants' representatives understand from the Examiner that in other related co-pending applications the Examiner considered references cited in the Forms PTO-1449 or SB/08 filed, but that she had crossed through some of the citations and did not initial the entries to avoid the printing of those documents on the face of any patent granted there from. In the present case, in light of the Examiner's representations regarding the crossing-out of references in the related co-pending applications, Applicants will consider any entries crossed through by her as having been properly submitted and considered by the Examiner, unless the Examiner specifically states otherwise in the papers returning the form.

**X. Conclusion**

With this amendment Applicants have added new claims 191-206 and amended claims 1, 47, 72, 75, 80, 96, 142, 167, 170, and 175. Applicants have also provided an amendment to the specification. In view of these foregoing amendments and the presented remarks, Applicants respectfully request the reconsideration and the continued examination of this application, and the timely allowance of the pending claims.

Should the Office have any questions regarding this response or wish to discuss this application, Applicants invite the Office to contact the undersigned to discuss an appropriate resolution to any inquiries.

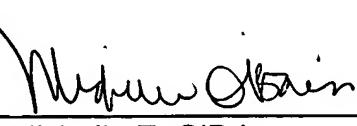
Please grant any extensions of time required to enter this response and charge any additional required fees to our deposit account 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER, L.L.P.

Dated: March 22, 2005

By:

  
Michelle E. O'Brien  
Reg. No. 46,203

Telephone: 202-408-4307  
Facsimile: 202-408-4400

**Enclosures**

- Exhibit A      Entries for "ethylenediamine/stearyl dimer dilinoleate copolymer," "ethylenediamine/stearyl dimer tallate copolymer," and "Uniclear" CTFA 10th Ed. (2004), pages 657-658 and 3583



Exhibit B Redacted Proprietary Documents

Exhibit C Claims from Co-Pending Cases

Declaration Under 37 C.F.R. § 1.131 of Mohamed Kanji

Declaration Under 37 C.F.R. § 1.132 of Stacy Sterphone